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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

SAVE THE HILL et al., Plaintiffs and Appellants, v. CITY AND COUNTY OF SAN FRANCISCO et al., Defendants and Respondents.	A153549 (San Francisco City & County Super. Ct. No. CPF-16515238)

Save the Hill and Grow Potrero Responsibly appeal a judgment denying their petition for writ of mandate challenging the City of San Francisco's decision to certify the final environmental impact report (EIR) for a mixed-use real estate development project in Potrero Hill, as well as the City's adoption of findings regarding the infeasibility of a project alternative under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.).[1] Plaintiffs contend that the City violated CEQA by: (1) streamlining the project's environmental review under a community plan exemption (§ 21083.3) and, as a result, failing to conduct sufficient analysis of the project's potential cumulative environmental impacts; (2) determining that the project's aesthetic impacts were exempt from CEQA (§ 21099); (3) failing to sufficiently analyze the project's cumulative traffic impacts and its inconsistencies with applicable area plans; (4) failing to require traffic mitigation measures; and (5)

[1] All further statutory references are to the Public Resources Code unless otherwise specified.

determining that an alternative project was infeasible. We conclude that the trial court correctly denied the petition for writ of mandate.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Eastern Neighborhoods Plan and Environmental Review

Following a development boom in the 1990s, the City began to recognize the need to identify appropriate locations for housing, while balancing the need to retain industrial lands necessary for the City's continuing role as an economic hub and employment center. In 2003, the City published a document entitled *Community Planning in the Eastern Neighborhoods: Rezoning Options Workbook*. This document included planning options for the City's eastern lands, including Bayview-Hunters Point, Showplace Square/Potrero Hill (Potrero), the Mission, and South of Market.

In 2006, the City developed revised planning options for East South of Market, the Mission, and Potrero.[2] The purpose of these proposed options was to "encourage new housing while preserving sufficient lands for necessary production[,] distribution and repair (PDR) (generally, light industrial) businesses and activities," and to prepare area plans to permit housing development in some areas previously zoned for industrial use. This effort culminated in options for proposed community plans covering four neighborhoods: Central Waterfront, Potrero, the Mission, and East South of Market (collectively, the Eastern Neighborhoods).

The City conducted environmental review in conjunction with its rezoning effort and published a 2007 draft Plan EIR analyzing three rezoning options—A, B, and C—for each neighborhood in the Eastern Neighborhoods. The options varied by the degree to which they permitted land zoned for industrial use to be converted to residential and mixed-use districts. Under all three options, most of the existing Heavy Industrial (M-2) and Light Industrial (M-1) districts would be replaced with one of three districts: (1)

[2] Separate redevelopment plans went forward for Bayview-Hunters Point and South of Market.

Mixed-Use Residential (MUR); (2) Urban Mixed-Use (UMU); or (3) Employment and Business Development (EBD) (later called PDR).

After extensive public comment, the City published the 2008 final Plan EIR, which included a "preferred project" resembling Option B with elements of Option C. The Plan EIR included growth forecasts for Options A, B, and C, and for the preferred project scenario. With respect to Potrero, it forecasted that by 2025, net housing units would be:

Option A: 2,294 units
Option B: 2,635 units
Option C: 3,891 units
Preferred Project: 3,180 units

These forecasts were based on projections of likely development through 2025, not on maximum zoning capacity at plan build-out. In Potrero, the preferred project allocated 84.1 acres for mixed-use and 71.5 acres for PDR.

In August 2008, the City's Planning Commission (Commission) certified the Plan EIR and recommended approval of the preferred project. The Commission also adopted Findings and a Statement of Overriding Considerations under CEQA for the Plan's significant and unavoidable environmental impacts, including transportation impacts, shadow impacts on parks and open spaces, and cumulative loss of PDR.

Beginning in December 2008 and continuing through early 2009, the City's Board of Supervisors approved, and the Mayor signed, the Eastern Neighborhoods rezoning and Planning Code amendments and new Area Plans for Central Waterfront, East South of Market, Mission, and Showplace Square/Potrero. As part of these approvals, the City rezoned the site that is the subject of this litigation to UMU, and it amended the height and bulk districts governing that site to 68 feet and 48 feet.

II. The Proposed Project

The project site consists of four adjacent lots in lower Potrero bounded by 16th Street to the north, Mississippi Street to the east, 17th Street to the south, and residential and industrial buildings to the west. The approximate 3.5-acre site contains two metal

shed warehouses, a modular office structure, and a vacant brick building from 1926. Surrounding uses include a park, offices, residences, retail, and warehouses.

Respondent Potrero Partners LLC submitted a revised environmental application for the project in 2014. The project will demolish all existing buildings other than the brick building and replace them with two mixed-use buildings totaling 395 residential units, 24,968 gross square feet (gsf) of retail, and 388 off-street parking spaces. The north building, at 901 16th Street, is six stories and 68 feet tall with 260 units. The south building, at 1200 17th Street, is four stories and 48 feet tall with 135 units. The buildings include rooftop elements that extend above the maximum building height, as permitted by San Francisco Planning Code section 260, subdivision (b). The project also includes 14,669 square feet (sf) of public open space; 33,149 sf of common open space for residents; and 3,114 sf of private open space.

The project is located in an area rezoned UMU under the Eastern Neighborhoods Plan along a transitioning industrial corridor connecting the Mission neighborhood to Mission Bay within the Potrero Plan area. Properties further northwest are zoned PDR-1-D (Production, Distribution, Repair-1-Design) while properties further south are primarily zoned RH-2 (Residential-House, Two Family). The project is generally consistent with applicable density, uses, height, open space, and other San Francisco Planning Code and Zoning Map standards. The Commission also approved six minor design exceptions and waivers for the project.

III. Environmental Review of the Proposed Project

On February 11, 2015, the Commission circulated a Notice of Preparation (NOP) and Community Plan Exemption (CPE) checklist for the project. In the CPE checklist, the Commission concluded that transportation and historic resources impacts required further analysis in a focused EIR. For all other categories, the CPE checklist determined that the project would not result in new or more severe environmental impacts than those identified in the Plan EIR. The CPE checklist noted that the project would contribute to the cumulative loss of PDR uses previously identified in the Plan EIR, and it incorporated the Plan EIR's mitigation measures to reduce impacts to archeological resources, air

quality, noise, and hazardous materials. The Commission also concluded that the project's aesthetic and parking impacts were exempt from CEQA because the project was a mixed-use residential project on an infill site located within a transit priority area (§ 21099).

In August 2015, the Commission circulated the project's draft EIR (DEIR). The DEIR described the project, discussed applicable City plans and policies, analyzed three project alternatives—the No Project, Reduced Density, and Metal Shed Reuse alternatives—and included the CPE checklist as an appendix.

The DEIR concluded that the project's Impact TR-2 (traffic impacts at three intersections) and Impact C-TR-2 (cumulative traffic impacts at four intersections) would be significant and unavoidable even after mitigation. The other thirteen transportation impacts would be less than significant, either with no mitigation or after implementing mitigation. Impacts to historic resources would be less than significant because only the brick office building qualified as a historic resource, and the project preserved and rehabilitated that building. The DEIR incorporated the Plan EIR's mitigation measures as identified in the CPE checklist, and proposed additional mitigation and improvement measures to reduce transportation impacts. Although the Commission did not believe it was required, the DEIR also included project elevations and visual simulations and assessed parking demand.

The Commission held a public hearing on the DEIR and received written comments. It subsequently released the Final EIR (collectively with the DEIR, the Project EIR), including responses to public comments and revisions to the DEIR in light of Senate Bill No. 743 and Commission Resolution No. 19579 regarding the use of vehicle miles traveled (VMT) instead of Level of Service (LOS) as the appropriate metric to assess traffic impacts.

On May 12, 2016, the Commission held a public hearing. In three separate motions, the Commission certified the Project EIR; adopted CEQA findings, including findings related to the infeasibility of project alternatives; and approved the project by

granting a Large Project Authorization (LPA) under section 329[3] of the San Francisco Planning Code.

On June 10, 2016, plaintiffs timely appealed the EIR certification to the Board of Supervisors, and they included a challenge to the Commission's infeasibility findings in this appeal. Plaintiffs did not appeal the LPA approval. The City Planning Department recommended that the Board of Supervisors: (1) uphold the Commission's certification of the EIR; and (2) reject plaintiffs' appeal of the Commission's CEQA infeasibility findings because such findings were appealable to the Board of Appeals as an element of the LPA approval, rather than to the Board of Supervisors.

On July 26, 2016, the Board of Supervisors held a public hearing on the appeal. It denied the appeal of the Project EIR's certification and affirmed its certification. On July 29, 2016, the City filed a Notice of Determination. Plaintiffs then filed a petition for writ of mandate. The trial court denied plaintiffs' petition, judgment was entered in November 2017, and plaintiffs timely appealed.

DISCUSSION

I. General CEQA Standards

" ' "The basic purposes of CEQA are to: [¶] (1) Inform governmental decision makers and the public about the potential, significant environmental effects of proposed activities. [¶] (2) Identify ways that environmental damage can be avoided or significantly reduced. [¶] (3) Prevent significant, avoidable damage to the environment by requiring changes in projects through the use of alternatives or mitigation measures when the governmental agency finds the changes to be feasible. [¶] (4) Disclose to the

[3] Since the date of appellant's administrative appeal, section 329 of the San Francisco Planning Code has undergone numerous amendments. Effective January 12, 2019, section 329 of the San Francisco Planning Code was most recently amended by Ordinance 296-18 such that former subdivisions (b)(1)–(2) and (e)–(e)(7) were redesignated as (b)(1)(A)–(B) and (f)–(f)(7), respectively. The citations herein are to section 329 of the San Francisco Planning Code effective as of plaintiff's June 10, 2016 administrative appeal.

public the reasons why a governmental agency approved the project in the manner the agency chose if significant environmental effects are involved." ' " (*McCorkle Eastside Neighborhood Group v. City of St. Helena* (2018) 31 Cal.App.5th 80, 88–89.) CEQA is designed to compel government to make decisions with environmental consequences in mind. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 393 (*Laurel Heights I*).)

If an agency determines that a project is not exempt from CEQA and it may have a significant effect on the environment, the agency must prepare an EIR before approval of the project. (See §§ 21100, subd. (a), 21151, subd. (a), 21080, 21084, subd. (a).) The agency notifies the public that a draft EIR is being prepared (§§ 21092, 21092.1), and evaluates the draft EIR in light of public comments. (Guidelines,[4] §§ 15087, 15088.) The lead agency then prepares a final EIR incorporating comments on the draft EIR and the agency's responses to significant environmental points raised. (*Id.*, §§ 15090, 15132, subds. (b)–(d).) The lead agency must certify that the final EIR has been completed in compliance with CEQA and that the information therein was considered by the agency before approving the project. (*Id.*, § 15090.)

"An appellate court's review of the administrative record for legal error and substantial evidence in a CEQA case, as in other mandamus cases, is the same as the trial court's: we review the agency's action, not the trial court's decision; in that sense appellate judicial review under CEQA is de novo." (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 427.) The court reviews the administrative record for prejudicial abuse of discretion. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1132–1133 (*Laurel Heights II*); *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 512 (*Sierra Club*).) " '[A]n agency may abuse its discretion under CEQA either by

[4] "Guidelines" refers to the Guidelines for Implementation of CEQA, which are found in the California Code of Regulations, title 14, section 15000 et seq. All subsequent citations to the Guidelines are to title 14 of the California Code of Regulations.

failing to proceed in the manner CEQA provides or by reaching factual conclusions unsupported by substantial evidence.' " (*Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 935.)

The California Supreme Court recently addressed this procedural/factual issues dichotomy and explained, " 'Judicial review of these two types of error differs significantly: While we determine de novo whether the agency has employed the correct procedures, "scrupulously enforc[ing] all legislatively mandated CEQA requirements" [citation], we accord greater deference to the agency's substantive factual conclusions. In reviewing for substantial evidence, the reviewing court "may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable," for, on factual questions, our task "is not to weigh conflicting evidence and determine who has the better argument." ' " (*Sierra Club, supra,* 6 Cal.5th at p. 512.)

"In most cases, the question whether an agency has followed proper procedures will have a clear answer. Did the agency provide sufficient notice and opportunity to comment on a draft EIR? [Citations.] Did the agency omit the required discussion of alternatives? [Citation.] As to these legal requirements, the agency has no discretion, and courts will invalidate an EIR that fails to meet them. In that sense, judicial review is de novo. [¶] But the question whether an agency has followed proper procedures is not always so clear. This is especially so when the issue is whether an EIR's discussion of environmental impacts is adequate, that is, whether the discussion sufficiently performs the function of facilitating 'informed agency decisionmaking and informed public participation.' " (*Sierra Club, supra,* 6 Cal.5th at pp. 512–513.)

After reviewing several of its own decisions and those of the Court of Appeal, the Supreme Court summarized three "basic principles" regarding the standard of review for claims challenging the adequacy of an EIR: "(1) An agency has considerable discretion to decide the manner of the discussion of potentially significant effects in an EIR. (2) However, a reviewing court must determine whether the discussion of a potentially significant effect is sufficient or insufficient, i.e., whether the EIR comports with its

intended function of including ' " 'detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.' " ' [Citation.] (3) The determination whether a discussion is sufficient is not solely a matter of discerning whether there is substantial evidence to support the agency's factual conclusions." (*Sierra Club*, *supra*, 6 Cal.5th at pp. 515–516.)

"The ultimate inquiry, as case law and the CEQA guidelines make clear, is whether the EIR includes enough detail 'to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.' " (*Sierra Club*, *supra*, 6 Cal.5th at p. 516.) Generally, that inquiry is a mixed question of law and fact subject to de novo review, but to the extent factual questions (such as the agency's decision which methodologies to employ for analyzing an environmental effect) predominate, a substantial evidence standard of review will apply. (*Ibid.*)

Courts "do not require technical perfection or scientific certainty: ' " '[T]he courts have looked not for an exhaustive analysis but for adequacy, completeness and a good-faith effort at full disclosure.' " ' " (*Sierra Club*, *supra*, 6 Cal.5th at p. 515.) The project opponents bear the burden of proving that the EIR is legally inadequate. (*Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners* (1993) 18 Cal.App.4th 729, 740; see § 21168.5.)

II. The Decision to Proceed under Section 21083.3

CEQA provides for streamlined environmental review in a number of different situations, such as with tiering EIRs, program EIRs, Master EIRs, and, as applicable here, planning or zoning EIRs. (Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2017) CEQA Streamlining and Special EIR Processes, § 10:1.) These streamlining provisions implement CEQA's policy that environmental review should be completed efficiently and expeditiously so that resources can be devoted to environmental mitigation, and they allow agencies to use special types of EIRs and sequential CEQA review processes to simplify EIR preparation and avoid duplication.

(Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2017) CEQA Streamlining and Special EIR Processes, § 10:2.)

Under section 21083.3, streamlined review is required for projects that are consistent with development densities established by an existing community plan for which an EIR was previously certified. (§ 21083.3, subd. (a); Guidelines, § 15183; *Wal-Mart Stores, Inc. v. City of Turlock* (2006) 138 Cal.App.4th 273, 279 (*City of Turlock*) [upholding approval of an ordinance based on Guidelines section 15183], disapproved of on another ground in *Hernandez v. City of Hanford* (2007) 41 Cal.4th 279, 297.) In these instances, CEQA review "shall be limited to effects upon the environment which are peculiar to the parcel or to the project and which were not addressed as significant effects in the prior environmental impact report, or which substantial new information shows will be more significant than described in the prior environmental impact report." (§ 21083.3, subd. (a).)

Plaintiffs challenge the City's decision to proceed under a CPE, but neither party cites authority discussing the standard of review applicable to the City's decision to do so. We find the Supreme Court's decision in *Friends of College of San Mateo Gardens v. San Mateo County Community College District* (2016) 1 Cal.5th 937 (*San Mateo Gardens*) instructive on this issue.

In *San Mateo Gardens*, the Supreme Court clarified the appropriate level of judicial scrutiny to be applied when an agency determines whether a proposed project is a new project, requiring environmental review in the first instance under section 21151, or whether it may proceed under section 21166's subsequent environmental review provisions. The Supreme Court explained that CEQA's subsequent review provisions are designed to ensure that an agency that proposes changes to a previously approved project " 'explore[s] environmental impacts not considered in the original environmental document.' " (*Id.*, at p. 951.) "A decision to proceed under CEQA's subsequent review provisions must . . . necessarily rest on a determination—whether implicit or explicit—that the original environmental document retains some informational value." (*Ibid.*) Thus, the Supreme Court held that the question of "whether an initial environmental

document remains relevant . . . is a predominantly factual question. It is thus a question for the agency to answer in the first instance, drawing on its particular expertise." (*Id.*, at p. 953.) A court's task on review of the agency's decision is to decide whether the agency's determination is supported by substantial evidence. (*Ibid.*)

Similarly, an agency's decision to proceed under section 21083.3's streamlined review provisions turns on factual determinations regarding the project's consistency with a community plan and on the relevancy of the information contained in the community plan EIR as applied to the proposed project. (§ 21083.3, subds. (a), (c); Guidelines, § 15183, subds. (a), (b).) As such, we review the City's initial determination to proceed under section 21083.3 for substantial evidence. (See *San Mateo Gardens, supra,* 1 Cal.5th at p. 953.)

Here, the record contains substantial evidence that the proposed project is consistent with development densities established by an existing community plan for which an EIR was certified. The project is proposed on a parcel zoned UMU under the Eastern Neighborhoods and Potrero Plans, and the Plan EIR analyzed the environmental effects of rezoning this parcel. The project is consistent with the City's bulk and height controls. The UMU district does not provide a maximum density for residential units other than through height limits; however, it requires that at least 40 percent of units contain two or more bedrooms. The project meets this requirement. The project's commercial uses are also below the maximum allotted gsf-per-lot of retail uses permitted in the UMU district. In light of these facts, the City properly determined to proceed under section 21083.3.

III. Sufficiency of the Environmental Review

Plaintiffs contend that the City's environmental review was inadequate both because issues requiring consideration were not addressed in the Project EIR and because issues that were addressed were not analyzed correctly. We consider each of these contentions in turn.

A. Issues Excluded from the Project EIR

1. Cumulative Impacts (Other than Traffic and Historical Resources)

With respect to the project's cumulative impacts, excepting those resulting from traffic and historical resources, the City found that the project would not result in new, project-specific environmental impacts, or impacts of greater severity than were already analyzed and disclosed in the Plan EIR. Plaintiffs disagree and argue generally that the project's cumulative impacts require further analysis because residential growth had exceeded that anticipated in the Plan EIR.[5]

As an initial matter, the parties disagree on the standard by which we should review whether the City properly determined how to comply with its obligations under section 21083.3. Plaintiffs contend that further environmental review under section 21083.3 is required if they present a fair argument that the project will have cumulative impacts that were not addressed in the Plan EIR. Respondents contend that an agency's determinations that the Plan EIR properly accounted for the project's potential cumulative impacts must be reviewed deferentially for substantial evidence. This issue has not been resolved. (See *City of Turlock*, *supra*, 138 Cal.App.4th at p. 287 [assuming without deciding that the fair argument standard applies]; *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1406–1407, fn. 24 [assuming a substantial evidence standard would apply, although suggesting in a footnote that it may not]; Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2017) CEQA Streamlining and Special EIR Processes, § 10:40 [suggesting that agency determinations under section 21083.3 should be reviewed for substantial evidence akin to agency decisions regarding whether a project's impacts are within the scope of a program EIR].)

[5] Plaintiffs discuss the cumulative loss of PDR and open space/recreation in their opening brief, but they concede in their reply brief that they do not separately challenge the City's determination that the Plan EIR adequately analyzed these impacts. Instead, plaintiffs state that they provided a discussion of these issues for context and to explain the importance of the Metal Shed Reuse alternative. Given this concession, we do not address these issues separately.

We need not decide this question, however, because even if a fair argument standard applies, plaintiffs' claim fails.

Under the fair argument test, the question is whether plaintiffs can fairly argue, on the basis of substantial evidence, that the project may produce reasonably foreseeable project-peculiar significant cumulative impacts that were not addressed in the Plan EIR. (§ 21083.3, subd. (a); Guidelines, § 15183, subds. (a), (b); see also *City of Turlock, supra*, 138 Cal.App.4th at p. 288.) "Substantial evidence" means "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (Guidelines, § 15384, subd. (a).) It includes "facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." (*Id.*, subd. (b).) "Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment does not constitute substantial evidence." (*Id.*, subd. (a).)

Plaintiffs first argue that residential growth in Potrero had exceeded that studied in the Plan EIR such that the project could no longer rely on the Plan EIR's environmental analysis. The Plan EIR studied the environmental impacts of growth of 2,294 to 3,891 residential units in Potrero, with a preferred project envisioning 3,180 residential units. The City's February 11, 2015 CPE checklist stated that the project's 395 units fell within the growth forecasted by the Plan EIR. To contradict this, plaintiffs rely on the Project EIR's statement that, as of February 23, 2016, 3,315 residential units in Potrero had completed or were planned to complete environmental review; of these, 2,379 units had completed environmental review, 936 units, including the project's 395 units, were under environmental review, and building permits had issued for 1,836 units. Yet plaintiffs provide no evidence of residential growth in Potrero as of the date of the project's NOP and CPE. (See Guidelines, § 15125, subd. (a) [baseline conditions for environmental review normally consist of the physical conditions existing when the NOP is published]; *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1127–1128 [the project

application date may be set as the cut-off date for purposes of a cumulative impacts analyses].) The record also shows that the 3,315 number was reduced to 3,119 by the time the Board of Supervisors reviewed the EIR certification because, as happens with residential development projects as they undergo review, several proposed projects shrank considerably. Plaintiffs accordingly have not shown with substantial evidence that residential growth exceeded that studied in the Plan EIR.

Plaintiffs also do not satisfy their burden with the draft 2011–2015 Eastern Neighborhoods Monitoring Report upon which they rely.[6] This draft report lists all residential development in Potrero through 2015, citing a total of 4,526 residential units, with 1,892 entitled or under construction and 2,634 under review. However, this report clearly states that it includes all development in the Eastern Neighborhoods, not just projects that rely on the Plan EIR. Its totals include, for example, almost one thousand units from the SF Potrero Hope project, a phased development that created a special use district and was subject to a comprehensive stand-alone EIR. Like the Project EIR, the draft 2011–2015 Eastern Neighborhoods Monitoring Report does not show that residential growth in Potrero had exceeded the range studied in the Plan EIR.

Plaintiffs also contend that the project's cumulative impacts require further analysis because more residential units were built before the date of the Plan EIR's certification than the Plan EIR reflects. This is a challenge to the residential baseline utilized in the Plan EIR, and it comes far too late. The City certified the Plan EIR and adopted Findings and a Statement of Overriding Considerations for the Plan's significant and unavoidable impacts in 2008. Plaintiffs do not suggest that they timely challenged the validity of the Plan EIR (see § 21167, subd. (c)), so the Plan EIR and its analysis of the cumulative environmental impacts of the rezoning in Potrero are conclusively presumed valid. (§ 21167.2; *Laurel Heights II*, *supra*, 6 Cal.4th at p. 1130; *Committee for Re-Evaluation of the T-Line Loop v. San Francisco Municipal Transportation Agency* (2016) 6 Cal.App.5th 1237, 1251.)

[6] The approved Eastern Neighborhoods Plan required monitoring reports every five years to track all development activity occurring within its boundaries.

Finally, plaintiffs argue that the City improperly relied on documents outside of the public review process for the Project EIR—the final 2011–2015 Eastern Neighborhoods Monitoring Report published after project approval, and a Commission memorandum tracking residential development in Potrero—to support its determination that the majority of the project's potential environmental impacts were studied in the Plan EIR. This argument has no merit. The City did not rely on the final 2011–2015 Eastern Neighborhoods Monitoring Report when making its CPE assessment. Instead, it sought judicial notice of this document in the trial court to show that the numbers reported in the 2011–2015 draft Eastern Neighborhoods Monitoring Report included projects that were not entitled under the Plan EIR. The City did not appeal the trial court's denial of its request for judicial notice, so this document is not relevant on appeal.

Regarding the Commission memorandum, the City was not required to publish the documents it relied on in making its decisions under section 21083.3. "The applicability of the exemption provided by [section 21083.3] to a project does not turn on whether the agency completed some form of preliminary review to determine whether the project is exempt. No such preliminary review or other procedure for applying the exemption is required by either [section 21083.3 or Guidelines section 15183]." (Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2017) CEQA Streamlining and Special EIR Processes, § 10:39.) Nonetheless, the City published a CPE checklist stating that the project was within the residential growth forecasted in the Plan EIR, and the City included updated residential development information in the Project EIR. The Commission memorandum merely provides the source for this published information, showing, like the Project EIR, that 2,379 units had undergone environmental review and 936 units, including the project, were under environmental review in Potrero as of February 23, 2016.[7]

[7] Plaintiffs briefly assert that use of the CPE was also invalid because the Plan EIR did not analyze a project of the proposed project's height and density. They do not develop this argument or support it with authority, instead referring us to their argument that the Project EIR disregarded inconsistencies with applicable area plans and policies.

2. Aesthetics

The City determined that the project's aesthetic impacts were exempt from CEQA under section 21099. " 'The scope of [a CEQA] exemption may be analyzed as a question of statutory interpretation and thus [is] subject to independent review.' " (*Covina Residents for Responsible Development v. City of Covina* (2018) 21 Cal.App.5th 712, 724 (*City of Covina*).) However, "[i]n determining the availability of a statutory exemption, ' " we review the administrative record to see that substantial evidence supports each element of the exemption. [Citations.] 'There must be "substantial evidence that the [activity is] within the exempt category of projects." [Citation.] That evidence may be found in the information submitted in connection with the project, including at any hearings that the agency chooses to hold.' " ' " (*Ibid*.)

The CEQA exemption in section 21099 provides, "[a]esthetic and parking impacts of a residential, mixed-use residential, or employment center project on an infill site within a transit priority area shall not be considered significant impacts on the environment." (§ 21099, subd. (d); see also *Protect Telegraph Hill v. City and County of San Francisco* (2017) 16 Cal.App.5th 261, 272 [applying section 21099's exemption for aesthetic impacts to a residential infill project within a transit priority area].) Effective on January 1, 2014, section 21099 was enacted as part of Senate Bill No. 743 (2013–2014 Reg. Sess.) to further the Legislature's strategy of encouraging transit-oriented, infill development consistent with the goal of reducing greenhouse gases. (*City of Covina*, *supra*, 21 Cal.App.5th at p. 725.)

There is little doubt that section 21099 applies to the project. An "infill site" includes "a lot located within an urban area that has been previously developed." (§ 21099, subd. (a)(4).) A "transit priority area" is "an area within one-half mile of a major transit stop that is existing or planned." (*Id.*, subd. (a)(7).) And, a "major transit stop" is "a site containing an existing rail transit station, a ferry terminal served by either a bus or rail transit service, or the intersection of two or more major bus routes with a

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Like the trial court, we treat this as a challenge to the Project EIR's discussion of plan inconsistencies.

frequency of service interval of 15 minutes or less during the morning and afternoon peak commute periods." (§ 21064.3.) The project is a mixed-use residential project proposed on an approximately 3.5-acre site that has been developed since the early 1900s. The project is within one-half mile of at least two existing major transit stops—the T-line station at Third Street and Gene Friend Way and the intersection of bus routes for the 19 Polk and the 22 Filmore, both with morning and afternoon frequency of service intervals of 15 minutes or less. Although plaintiffs argue that these transit stops are not within a five-minute walk, they concede that they are within section 21099's half-mile standard. The Project EIR properly excluded analysis of the project's aesthetic impacts.

B. Adequacy of the Project EIR

In addition to asserting that the Project EIR improperly excluded consideration of certain impacts, plaintiffs also argue that the Project EIR inadequately addressed the project's traffic impacts and purported inconsistencies between the project and other area plans. These contentions, too, are unavailing.

1. Traffic

Plaintiffs argue that the Project EIR's discussion of cumulative traffic impacts is inadequate and that the City failed to consider implementation of suggested traffic mitigation measures. We address each argument in turn.

a. Cumulative Traffic Impacts

When a project's incremental effect is cumulatively considerable, an EIR must discuss cumulative impacts. (Guidelines, § 15130, subd. (a).) "Cumulative impacts" are "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts . . . . The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects." (*Id.*, § 15355, subd. (b).) An EIR's cumulative impacts analysis need not provide as great detail as is provided for the effects attributable to the project alone and should be guided by standards of practicality and reasonableness.

(*Id.*, § 15130, subd. (b); *City of Maywood v. Los Angeles Unified School Dist.* (2012) 208 Cal.App.4th 362, 397.) Courts generally uphold a cumulative impacts analysis that demonstrates a " 'good faith effort at full disclosure.' " (*City of Maywood*, at p. 397.)

Plaintiffs contend that the Project EIR's cumulative traffic impacts analysis was flawed in three main respects: 1) the City should have used a list of projects methodology; 2) the City relied on the growth rate derived from the Plan EIR's cumulative traffic impacts analysis, meaning that its methodology improperly failed to account for development in Potrero; and 3) the City should have taken traffic counts from additional intersections in 2015. We review these attacks on the methodology of the cumulative traffic impacts analysis for substantial evidence. (*City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 898 (*Long Beach*); *South of Market Community Action Network v. City and County of San Francisco* (2019) 33 Cal.App.5th 321, 340–342 (*South of Market*).)

Under CEQA, the City's election to proceed under a summary of projections approach for cumulative impacts was permissible. An agency may use a list of projects approach or a summary of projections approach to cumulative impacts analyses. (§ 21100, subd. (e); Guidelines §15130, subds. (b)(1)(A), (B)). Plaintiffs' argument that the City should have proceeded under a list of projects approach is thus unavailing. (See *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 928.)

Under the summary of projections approach, the Project EIR includes an analysis of transportation and circulation impacts. This analysis is supported by a Transportation Impact Study (TIS) prepared by DKS Associates. The TIS's methodology was consistent with the City's Transportation Impact Analysis Guidelines. For the TIS, DKS gathered traffic counts from fourteen intersections in 2012 and 2014 in order to characterize traffic conditions. The TIS thus did not rely on traffic counts obtained for the Plan EIR and instead took into account changes in traffic that occurred as a result of development in Potrero after the City certified the Plan EIR. (See *Pfeiffer v. City of Sunnyvale City*

Council (2011) 200 Cal.App.4th 1552, 1572 [an EIR includes existing conditions, based on actual traffic counts, in its analysis of traffic impacts].)

The cumulative impacts analysis then calculated anticipated increases in traffic through 2025. Plaintiffs contend that this analysis used outdated growth projections, but the record does not support this argument. Cumulative conditions were developed using the Plan EIR's forecasted growth projections—projections that plaintiffs have not established were exceeded—as well as a general increase in traffic throughout the region based on the City's transportation model. As noted in the Project EIR, these projections accounted for growth from various residential developments, including those that plaintiffs contend should have been accounted for in the traffic impacts analysis.

The projected increases in traffic were then added to the existing traffic counts, as well as the estimate of traffic that the project would generate. For intersections not studied in the Plan EIR, the TIS determined the 2025 cumulative traffic conditions in a two-step process, as follows: first, the TIS calculated the annual percentage increase in the volume of intersection turning movements between the existing conditions and the cumulative conditions for the analysis years; second, the TIS applied that rate of increase to the observed volumes of intersection turning movements to determine the 2025 cumulative conditions.[8] The City compared its results with traffic studies performed by other agencies, and it included additional analysis pertaining to vehicle miles traveled (VMT) and induced demand pursuant to Senate Bill 743 and Planning Commission Resolution 19579. Plaintiffs have not established that the Project EIR fails to properly describe and analyze cumulative traffic conditions.

The City's decision to limit updated 2015 traffic counts to five intersections was also supported by substantial evidence. After publishing the project DEIR, the City received comments that the 2012 and 2014 traffic counts might be too old to capture

[8] Although "intersection turning movement" appears to be a term of art not precisely defined in the record, review of the TIS and the Draft EIR indicate that the term means any vehicle movement through an intersection, whether by turning left, turning right, or proceeding straight through.

traffic from the new UCSF Medical Center at Mission Bay. In response, the City collected additional traffic counts in November 2015. Data collection and assessment focused on intersections that would experience delay from project traffic and those that would be affected by UCSF Mission Bay traffic. Of the intersections studied, only one, the 7th/16th/Mississippi intersection, showed growth in overall traffic volume with an increase of 6 percent; however, this increase was not enough to affect the intersection's LOS. The data does not support plaintiffs' argument that traffic conditions deteriorated after 2012. Further, because the public comments on the DEIR expressed concern about the newer UCSF traffic, the City's decision to study intersections that may be affected by this traffic was rational and justified.

Plaintiffs additionally challenge the Project EIR's failure to include the Warriors' arena project in its cumulative traffic impacts analysis. An agency's decision regarding the inclusion of information in a cumulative impacts analysis is reviewed for abuse of discretion. (*Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1228.) " ' "The primary determination is whether it was reasonable and practical to include the projects and whether, without their inclusion, the severity and significance of the cumulative impacts were reflected adequately." ' " (*Ibid.*) " ' "CEQA requires an EIR to reflect a good faith effort at full disclosure; it does not mandate perfection, nor does it require an analysis to be exhaustive." ' " (*Long Beach, supra*, 176 Cal.App.4th at p. 898.) " 'Therefore, "[n]oncompliance with CEQA's information disclosure requirements is not per se reversible; prejudice must be shown." [Citations.]' [Citations.] [¶] 'Failure to comply with the information disclosure requirements constitutes a prejudicial abuse of discretion when the omission of relevant information has precluded informed decisionmaking and informed public participation.' " (*Ibid.*)

Here, the Project EIR's cumulative traffic impacts analysis appears to have considered traffic effects from the Warriors' arena. The Project EIR stated that growth at the arena site had been considered because its analysis incorporated the Plan EIR's growth projections, and these projections assumed the arena site would be densely

developed as the previously-proposed Salesforce headquarters. Cumulative conditions were also compared for consistency with the UCSF 2014 Long Range Development Plan EIR.

The Project EIR also disclosed that it and the EIR for the Warriors' arena studied several overlapping intersections, but only the intersection at 7th/16th/Mississippi Street was identified as being impacted by both projects. This intersection would operate at an unacceptable level of service under cumulative conditions, and the project's impact on this intersection would be significant and unavoidable. When an intersection is projected to operate at an unacceptable level of service even without the addition of project traffic, whether a project's contribution would be considerable is determined based on the percent contribution of the project's traffic to the volume of traffic already in the intersection. Thus, although trips added by the arena would increase the baseline cumulative traffic volumes at the intersection at 7th/16th/Mississippi Street during weekday peak traffic hours, they would also decrease the percent contribution that the project would add to the intersection. As a result, the Project EIR allows for informed decisionmaking by explaining that, even with inclusion of the Warriors' arena traffic, the project would not have a more considerable impact on the cumulative traffic volumes at the 7th/16th/Mississippi Street intersection than the impact disclosed in the draft EIR.

Finally, plaintiffs challenge the Project EIR's responses to public comments that suggested that the cumulative traffic impacts analysis should have included specific development projects. The City was required to provide good faith, detailed responses to significant environmental issues raised in the public review process. (Guidelines, § 15088, subd. (c); *City of Irvine v. County of Orange* (2015) 238 Cal.App.4th 546, 549.) A response may be sufficient if it refers to the parts of the draft EIR that analyze the environmental impacts raised by the comment. (E.g., *Paulek v. Department of Water Resources* (2014) 231 Cal.App.4th 35, 49.) Here, the City responded to plaintiffs' comments by referring to the Project EIR's discussion of cumulative traffic impacts; by specifying that the growth projections in the Plan EIR accounted for growth in traffic from the residential developments mentioned in the comments; and by explaining why

the Warriors' arena project was not specifically addressed and why it would not cause significant change to the Project EIR's traffic analysis. This response was legally adequate.[9]

b. Traffic Mitigation Measures

Plaintiffs next assert that the City violated CEQA by failing to consider the adoption of traffic calming measures and by failing to respond to public concerns about traffic, although they do not specify in their briefing which traffic calming measures should have been considered or why such measures were feasible. In the absence of specific and reasoned argument on this issue, we treat it as waived. (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956 (*Cahill*).)

Nonetheless, plaintiffs' argument is also factually inaccurate. The Project EIR detailed several traffic and signal calming measures that were incorporated into the project description and as mitigation measures, and it explained that signalization of the intersection at Mariposa and Mississippi Streets was inadvisable because traffic patterns were more effectively served by the existing stop pattern. The Project EIR also identified, and the City adopted, a Transportation Demand Management (TDM) plan, with a goal of reducing one-way vehicle trips by 10 percent. (See *Mission Bay Alliance v. Office of Community Investment & Infrastructur*e (2016) 6 Cal.App.5th 160, 179–188 [transit service plan upheld as project component to reduce transportation impacts]; *City of Hayward v. Trustees of Cal. State Univ.* (2015) 242 Cal.App.4th 833, 851–852 [TDM Plan included in proposed master plan upheld as CEQA mitigation].)

In response to public comments seeking the imposition of traffic calming measures to protect pedestrians, the City explained that the project would not have a significant impact related to traffic hazards to pedestrians or bicyclists. The City also

[9] Without identifying any of their specific comments, plaintiffs also assert that the City failed to "adequately respond" to their comments expressing concern that unanticipated growth had placed demands on recreation and open space. Our review of the Project EIR shows that the City properly provided multiple pages of detailed explanation for its determination that the CPE remained viable and growth in Potrero had not exceeded that forecasted in the Plan EIR.

explained that mitigation measures are required only for significant adverse impacts. (Guidelines, § 15126.4, subd. (a)(3).) Thus, the City properly and adequately explained why the Project EIR did not incorporate the additional traffic calming measures suggested by plaintiffs.

2. Plan Inconsistencies

CEQA Guidelines require an EIR to discuss any inconsistencies between a proposed project and applicable general plans, specific plans, and regional plans, although the EIR need not resolve these inconsistencies. (Guidelines, § 15125, subd. (d).) Plan inconsistency may be evidence that the inconsistent project feature will result in a significant environmental effect, but it is not itself an environmental impact. (Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2017) Project Description, Setting, and Baseline, § 12:34.)

To support their challenge to the adequacy of the Project EIR's discussion of plan inconsistencies, plaintiffs list fourteen plan policies and objectives in bullet-point fashion with which they contend the project conflicts. For eleven of these, plaintiffs make only a conclusory statement regarding conflict, but they do not support their challenge with further argument or evidence. Plaintiffs have waived these challenges.[10] (*Cahill*, *supra*, 194 Cal.App.4th at p. 956; *South of Market*, *supra*, 31 Cal.App.5th at p. 354.)

With respect to the remaining three policies, plaintiffs' briefing is not the model of clarity. However, they appear to argue that the project conflicts with the Potrero Plan's policy regarding traffic (Objective 4.9) and its land use policies (Objectives 1.1 and 1.7), and they additionally argue that the project's proposed height at 68 feet on 16th Street causes plan inconsistencies that were not discussed in the Project EIR.

The record does not support plaintiffs' claims. The Project EIR contained a detailed analysis of the project's potential traffic impacts and explained that the project

[10] This waiver includes challenges that the project is inconsistent with objective 3 of the San Francisco General Plan's Urban Design Element; policy 2 and priority policy 8 of the San Francisco General Plan; and objectives 1.2, 3.1, 6.1 and policies 3.1.1, 3.1.2, 3.1.5, 3.1.6, and 3.1.9 of the Potrero Plan.

may be potentially inconsistent with Objective 4.9 of the Potrero Plan. Similarly, the Project EIR identifies the Potrero Plan's Objectives 1.1 and 1.7 and the project's impact on the loss of PDR, stating "[t]he proposed loss of 109,500 square feet of existing PDR uses represents a considerable contribution to the loss of the PDR space analyzed in the [Plan EIR], but would not result in significant impacts that were not identified, or more severe impacts than were analyzed, in the [Plan EIR]." The City proceeded as required under Guidelines section 15125, subdivision (d), and no more was necessary to inform decisionmakers of potential plan inconsistencies.

Plaintiffs likewise do not support their argument that the project's 68-feet height on 16th Street caused plan inconsistencies that were unaddressed in the Project EIR and that could cause potential environmental impacts. Contrary to plaintiffs' claim, the project's height is consistent with the Planning Code and the Potrero and Eastern Neighborhoods Plans, and the final Plan EIR contemplated building heights of 68 feet on the north and south side of 16th Street. Moreover, as plaintiffs concede in their reply brief, their challenge regarding the project's height amounts to an argument that the project may have significant impacts on aesthetics and views. Plaintiffs may disagree with the policy behind section 21099, but the statute applies to the project and exempts its aesthetic impacts from CEQA.

Finally, although the Project EIR discussed potential inconsistencies with applicable area plans, the City ultimately concluded that the project was consistent with these plans. Plaintiffs concede that they do not challenge this consistency determination. No analysis is required in an EIR if the project is consistent with the relevant applicable plans. (*The Highway 68 Coalition v. County of Monterey* (2017) 14 Cal.App.5th 883, 896.) Given the City's consistency determination, the Project EIR provides more information than CEQA requires.

IV. Project Alternatives

When the City approved the project, it adopted CEQA findings rejecting the Metal Shed Reuse alternative as infeasible. Plaintiffs challenge this infeasibility finding and argue that the City's Board of Supervisors improperly failed to consider their appeal on

this issue. Respondents defend on two grounds: 1) plaintiffs did not exhaust their administrative remedies with respect to this claim; and 2) substantial evidence supports the City's infeasibility findings. We disagree with respondents on the first ground but agree that substantial evidence supports the City's economic infeasibility finding.

A. Exhaustion of Administrative Remedies

"The exhaustion of administrative remedies doctrine 'bars the pursuit of a judicial remedy by a person to whom administrative action was available for the purpose of enforcing the right he seeks to assert in court, but who has failed to commence such action and is attempting to obtain judicial redress where no administrative proceeding has occurred at all; it also operates as a defense to litigation commenced by persons who have been aggrieved by action taken in an administrative proceeding which has in fact occurred but who have failed to "exhaust" the remedy available to them in the course of the proceeding itself.' " (*Citizens for Open Government v. City of Lodi* (2006) 144 Cal.App.4th 865, 874 (*City of Lodi*).)

"Because this exhaustion requirement depends on the availability of a remedy within the administrative proceeding, we must examine the procedures applicable to the proceeding." (*Clews Land & Livestock, LLC v. City of San Diego* (2017) 19 Cal.App.5th 161, 185 (*Clews Land*).) "We apply a de novo standard of review to the legal question of whether the doctrine of exhaustion of administrative remedies applies in a given case." (*City of Lodi, supra*, 144 Cal.App.4th at p. 873.) We likewise review de novo the trial court's interpretation of the applicable City codes. (*Save Our Heritage Organisation v. City of San Diego* (2015) 237 Cal.App.4th 163, 174.)

Plaintiffs argue that they exhausted their administrative remedies because their challenge to the Commission's CEQA feasibility findings is appealable to the Board of Supervisors under San Francisco's local CEQA regulations, which are set forth in Chapter 31 of the San Francisco Administrative Code (Administrative Code). Respondents counter that the Board of Appeals had to hear this part of plaintiffs' appeal along with any appeal of the LPA approval under San Francisco Planning Code section 329. Before turning to the local codes, some general background regarding the

sequencing of the environmental review and project approval process under CEQA is instructive.

After publishing a final EIR and prior to project approval, the lead agency must certify the project's EIR by making findings that the EIR complies with CEQA, that it reflects the lead agency's independent judgment and analysis, and that it was presented to the decisionmaking body, which reviewed and considered the information therein before approving the project. (§ 21082.1, subd. (c); Guidelines, § 15090, subd. (a)(1)–(3).) Next, the lead agency must adopt findings that the project will not have a significant effect on the environment; or that the agency has eliminated or substantially lessened all significant effects on the environment when feasible and has determined that any remaining significant effects are acceptable when balanced against the project's benefit. (§ 21081; Guidelines, § 15091.) The agency must also adopt any applicable mitigation monitoring and reporting program. (§ 21081.6; Guidelines, § 15091, subd. (d).) Then, "[a]fter considering the final EIR and in conjunction with making findings under Section 15091, the lead agency may decide whether or how to approve or carry out the project." (Guidelines, § 15092, subd. (a).) Project approval and the adoption of feasibility findings are thus distinct from EIR certification. (Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2017) Certification of EIR and Decision to Approve Project, § 17:2.)

Chapter 31 of the Administrative Code incorporates this sequencing. When a final EIR has been prepared that is adequate, accurate, and objective, and the EIR reflects the Commission's independent judgment and analysis, the Commission shall certify its completion in compliance with CEQA. (S.F. Admin. Code, § 31.15, subd. (d).) The EIR certification and the final EIR then "shall be presented to the body which will decide whether to carry out or approve the project." (*Id.*, § 31.17, subd. (a).) Before making its decision whether to approve a project, the decisionmaking body "shall review and consider the information contained in the EIR and shall make findings as required by CEQA." (*Id.*, subd. (b).) After this, "the decision-making body . . . makes its decision whether to carry out or approve the project." (*Id.*, subd. (c).)

Respondents argue that only one of these administrative determinations—EIR certification—is appealable to the Board of Supervisors. Entitled, "Appeal of Certain CEQA Decisions," section 31.16, subdivision (a) of the Administrative Code provides: "(a) Decisions Subject to Appeal. In accordance with the provisions set forth in this Section 31.16, the following CEQA decisions may be appealed to the Board of Supervisors (the "Board"): (1) certification of a final EIR by the Planning Commission; (2) adoption of a negative declaration by the first decisionmaking body; and (3) determination by the Planning Department or any other authorized City department that a project is exempt from CEQA." Because section 31.16, subdivision (a) does not expressly allow for appeals of the Commission's CEQA feasibility findings, and because the EIR certification (Motion 19643) was separate from the CEQA findings (Motion 19644) and the LPA Approval (Motion 19645), respondents contend that plaintiffs had to first appeal this decision to the Board of Appeals under San Francisco Planning Code section 329.

San Francisco Planning Code section 329 allows for appeals of the Commission's decisions approving large projects in mixed-use districts in the Eastern Neighborhoods to the Board of Appeals. Under that section, the Commission must conduct design review for all such projects, must hold a public hearing to evaluate the physical aspects of the proposed project, and may impose modifications or conditions as needed to respond to any unusual or unique location, environmental, topographical or other relevant factors. (S.F. Planning Code, § 329, subds. (c), (e)(1).) After considering the Planning Director's design review recommendations and making appropriate findings, the Commission may approve or disapprove the project, or approve it subject to conditions, and this decision may be appealed to the Board of Appeals. (*Id.*, § 329, subds. (e)(4)–(5).)

Plaintiffs did not appeal the CEQA feasibility findings at issue to the Board of Appeals; however, this failure does not prevent them from challenging these findings here because the City's Planning Code does not require appeal of CEQA feasibility findings to the Board of Appeals. Instead, Planning Code section 329 addresses zoning compliance, design review, and requests for exceptions for large projects in the Eastern

Neighborhoods mixed use districts. The Planning Code contemplates appeals of the Commission's decision to approve the project and any accompanying requests for exception following a public hearing to evaluate the physical aspects of the proposed project (Motion 19645, which plaintiffs did not appeal), but it does not address appeal of CEQA feasibility findings or the statement of overriding considerations (Motion 19644). (S.F. Planning Code, § 329, subds. (c), (e)(4)–(5).)

In addition, requiring plaintiffs to appeal the CEQA feasibility findings to the Board of Appeals when they appealed the EIR certification to the Board of Supervisors would be futile under the provisions of the City's Administrative Code. For projects that require multiple approvals, where a party appeals the Commission's EIR certification, Administrative Code section 31.16, subdivision (c)(3) prohibits any City boards, commissions, or departments from carrying out or considering further approval of the project while the appeal is pending. If the Board of Supervisors affirms the Commission's EIR certification, all actions approving the project taken prior to the appeal are deemed valid. (S.F. Admin. Code, § 31.16, subd. (b)(9).) Conversely, if the Board of Supervisors reverses the EIR certification, all prior approval actions are deemed void. (*Id.*, at § 31.16, subd. (b)(10).) The Board of Appeals therefore could not afford plaintiffs relief. (See *Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 217 [noting it is "settled" that the rule requiring exhaustion of administrative remedies does not apply where an administrative remedy is unavailable or inadequate].)

Accordingly, plaintiffs were not required to appeal the CEQA feasibility findings to the Board of Appeals to exhaust their administrative remedies.[11]

Plaintiffs also briefly argue that the Board of Supervisors erred by failing to hear their appeal of the Commission's CEQA feasibility findings. We disagree. Preliminarily, we note that, despite the City Attorney's and Commission's position that the Board of Supervisors should not consider plaintiffs' appeal regarding the CEQA feasibility findings, the Commission's economic feasibility finding was in fact discussed at the public hearing held by the Board of Supervisors. That hearing included testimony by the Commission employee who analyzed the economic feasibility analysis that supported the Commission's CEQA feasibility findings. In any case, although CEQA and the Administrative Code required the Board of Supervisors to hear an appeal of the EIR certification, that is the only appeal they required the Board of Supervisors to hear. (§ 21151, subd. (c); Guidelines, §§ 15090, subd. (b); S.F. Admin. Code, § 31.16, subd. (a).) Under the Administrative Code, when the Board of Supervisors approved the EIR's certification, it thereby approved all prior actions by the Commission, including the CEQA feasibility findings. (S.F. Admin. Code, § 31.16, subd. (b)(9).) For these reasons, we reject plaintiffs' contention that the Board of Supervisors had to make a specific

[11] To the extent that respondents suggest the Board of Appeals retained the ultimate authority to approve the project despite plaintiffs' appeal of the Project EIR's certification, such construction of the City's appeal process would violate CEQA. "CEQA requires the person or persons responsible for approving a project (the 'decisionmaking body' in CEQA parlance) also be responsible for complying with CEQA's environmental review (e.g., by certifying an EIR, adopting a negative declaration or MND [mitigated negative declaration], or determining that the project is exempt)." (*Clews Land, supra*, 19 Cal.App.5th at p. 187, citing Guidelines, §§ 15025, subd. (b), 15356.) If authority is properly delegated within an agency, the decisionmaking body may be an unelected official or commission, such as occurred with the Commission in the first instance here. (*Ibid.*) By requiring that an appeal of EIR certification be made available to an agency's "elected decisionmaking body" where a nonelected decisionmaking body certifies the EIR in the first instance (§ 21151, subd. (c)), CEQA requires that the elected decisionmaking body have the power to approve or disapprove the project. (Guidelines, § 15356.)

determination on their appeal of the CEQA feasibility findings, but nonetheless find that plaintiffs may pursue this challenge in court.

B. The Metal Shed Reuse Infeasibility Determination

It is the "policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects." (§ 21002.) " 'Feasible' means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." (§ 21061.1; Guidelines, § 15364.) However, "[i]n the event specific economic, social, or other conditions make infeasible such project alternatives or such mitigation measures, individual projects may be approved in spite of one or more significant effects thereof." (§ 21002.) If an EIR identifies significant effects on the environment that would occur if the project is approved, the lead agency shall not approve the project unless it makes written findings that the impacts have been mitigated or that specific economic, legal, social, technological, or other considerations make the alternatives infeasible. (§ 21081, subd. (a); Guidelines, § 15091.)

The Project EIR identified the project's significant effects on the environment, discussed mitigation, and found that four traffic impacts could not be mitigated. The Project EIR also identified alternatives, including the 177-unit Metal Shed Reuse alternative, and analyzed their environmental impacts. When approving the project, the Commission rejected the Metal Shed Reuse alternative as infeasible for the six reasons summarized below:

1. It would not fulfill the City's "important policy objective . . . to increase the housing stock whenever possible to address a shortage of housing in the City;"
2. It would not reduce the significant and unavoidable traffic-related impacts to less than significant levels;
3. It was unnecessary to reuse the metal sheds for PDR uses because the "City adopted overriding findings that the loss of PDR space and uses within the UMU district was an unavoidable but acceptable cumulative land use impact" when it adopted the Eastern Neighborhoods Plan and the Potrero Plan;

4. It would not meet to the same degree or be as consistent as the project with the City's Strategies to Address Greenhouse Gas (GHG) Emissions or CEQA and the air district's requirements for reducing GHG emissions;
5. It did not incorporate as many of the positive urban design features as the project, and it would provide inferior light and air exposure to residential units; and
6. It was economically infeasible because the "reduced unit count would not generate a sufficient economic return to obtain financing and allow development."

An agency's infeasibility findings will be upheld if supported by substantial evidence. (*California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 997.) These findings are entitled to great deference and " 'are presumed correct. The parties seeking mandamus bear the burden of proving otherwise, and the reviewing court must resolve reasonable doubts in favor of the administrative findings and determination.' [Citation.]" (*Ibid*.) Under this standard, and on this record, the Commission's findings regarding infeasibility must be upheld.

Plaintiffs' main challenge is to the sixth finding, wherein the Commission determined that the Metal Shed Reuse alternative was economically infeasible. A project alternative may be found infeasible on economic grounds. (§ 21081, subd. (a)(3); Guidelines, § 15091, subd. (a)(3).) " ' "The fact that an alternative may be more expensive or less profitable is not sufficient to show that the alternative is financially infeasible. What is required is evidence that the *additional* costs or lost profitability are sufficiently severe as to render it impractical to proceed with the project.' " [Citations.] Thus, when the cost of an alternative exceeds the cost of the proposed project, 'it is the magnitude of the difference that will determine the feasibility of this alternative.' " (*Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 883.) Ultimately, the question is "whether the marginal costs of the alternative as compared to the cost of the proposed project are so great that a reasonably prudent [person] would not proceed with the [altered project]." (*Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, 600 (*Uphold Our Heritage*).)

The sixth finding derives support from a financial feasibility analysis prepared by a qualified real estate consulting firm, Seifel Consulting (the Seifel memo). Based on evidence gathered from interviews with members of the real estate community, including developers, this memo stated that developers required 18 percent to 25 percent margin on cost, or a 5.5 percent to 6 percent yield on cost, on a project to warrant the risk of necessary private investment. It concluded that the Metal Shed Reuse alternative's development costs exceeded potential revenues, and the developer margin fell below the required threshold. To support this conclusion, the Seifel memo estimated development costs and projected revenues for the project and its alternatives, and it compared the alternatives as apartments and condominiums. For the alternatives, developer margin on cost ranged from -1 percent to 7 percent, and yield on cost ranged from 4.6 percent to 4.9 percent, whereas the project gave an 18 percent margin on cost and 5.5 percent yield on cost. The Seifel memo thus concluded that the Metal Shed Reuse alternative was financially infeasible.

Commission staff independently reviewed the Seifel memo, found that its methodology and approach were appropriate and consistent with professional standards, and concurred that the Metal Shed Reuse's low-density alternative was not financially feasible. Citing the Seifel memo, the Commission then concluded in detailed, written findings that the Metal Shed Reuse alternative was economically infeasible because it would not be funded or built. This evidence provides substantial support for the Commission's conclusion that a reasonably prudent developer would not proceed with the Metal Shed Reuse alternative.

The authorities relied on by plaintiffs do not detract from this conclusion. In *Citizens of Goleta Valley v. Board of Supervisors* (1988) 197 Cal.App.3d 1167, 1180–1181, the record contained no evidence supporting an economic infeasibility finding because there was no evidence of any financial analysis of the alternative project in terms of comparative costs, profit or losses. Similarly, in *Burger v. County of Mendocino* (1975) 45 Cal.App.3d 322, 326–327, the record did not contain any "estimate of income or expenditures" for a smaller motel that the county found to be economically infeasible.

In *County of San Diego v. Grossmont-Cuyamaca Community College Dist.* (2006) 141 Cal.App.4th 86, 107–108, the record contained no evidence of the cost of an agency's share of proposed mitigation for traffic improvements, and, as a result, "no substantial evidence" supported the agency's economic infeasibility finding rejecting that measure. Here, by contrast, the Commission relied on a comparative financial analysis in reaching a determination of infeasibility. Plaintiffs' disagreement with the financial analysis is immaterial. (See *Laurel Heights I*, *supra*, 47 Cal.3d at p. 393.)

Finally, in *Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, also cited by plaintiffs, the city "failed to make a specific finding regarding the infeasibility of the reduced-size alternative," and the record did not contain any financial analysis to support such a finding. On that record, the court found that an agency could not blindly accept a developer's claim that it would not build a reconfigured project. (*Id.*, at pp. 1355–1356.) In this case, the Commission adopted specific findings about the infeasibility of the Metal Shed Reuse alternative, cited supporting evidence, and Commission staff independently reviewed this evidence. *Preservation Action Council* is thus distinguishable.

Plaintiffs raise purported improprieties with the Seifel memo's exclusion from the public hearing packet and the City's closure of public comment prior to its discussion of the feasibility analysis, but both can be quickly discounted. Evidence supporting an agency's feasibility findings may be contained anywhere in the administrative record. (*Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1401.) In addition, CEQA does not require an agency to provide the public with an opportunity to review and comment on an economic feasibility analysis; to hold otherwise "would be inconsistent with the court's recognition that it is the administrative agency, and not the public, that weighs the benefits of a project against its effects and bears responsibility for the decision to approve or reject the project." (*Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1505.) Nor does CEQA require that the public be afforded an opportunity to debate economic feasibility, instead requiring "the

public to be informed if its officials choose economic feasibility over environmental concerns in approving a project." (*Id.*, at p. 1506.)

Plaintiffs also contend that the Seifel memo is flawed because its analysis used land value cost instead of the developer's land acquisition cost and a $2.50 per square foot rental value for PDR space instead of $4. These attempts to nitpick the Seifel memo are unavailing. Although plaintiffs claim that land acquisition cost is an agency standard, they do not support this argument with evidence. Moreover, the use of the objective land value cost derives support in case law. *Uphold Our Heritage, supra,* 147 Cal.App.4th at pp. 559–600, for example, clarified that an applicant's subjective situation and wealth is not relevant when considering the economic feasibility of a project alternative. "[T]he question is not whether [the project applicant] can afford the proposed alternative, but whether the marginal costs of the alternative as compared to the cost of the proposed project are so great that a reasonably prudent [person] would not proceed." (*Id.*, at p. 600.)

Regarding rental value for PDR space, plaintiffs cite a promotional publication to support their $4 per square foot figure. This publication in fact recites a range for industrial rents in the City of $2 to $4 per square foot, but in any event, the $2.50 rate chosen by the City's expert was based on substantial evidence gathered from members of the real estate community. The Commission also confirmed this assumption was reasonable. Plaintiffs may disagree with the assumptions used, but disagreement does not negate the fact that the Seifel memo provides substantial evidence to support finding 6. (See *Sierra Club v. County of Napa*, *supra*, 121 Cal.App.4th at p. 1508.) Because our conclusion disposes of plaintiffs' challenge to the City's infeasibility findings, we do not reach the issue of whether substantial evidence supports the remaining five infeasibility findings. (See *Save Panoche Valley v. San Benito County* (2013) 217 Cal.App.4th 503, 523 [where an agency cites several independent reasons why an alternative is infeasible, the agency's determination will be upheld if one of these reasons is supported by substantial evidence].)

DISPOSITION

The judgment is affirmed.

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BROWN, J.

WE CONCUR:

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STREETER, ACTING P. J.

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TUCHER, J.